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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

DENISE M., Plaintiff and Respondent, v. CHRISTOPHER BURNETT, Defendant and Appellant.	A142006 (San Mateo County Super. Ct. No. CIV523986)

Christopher Burnett (defendant) appeals from orders enjoining him from harassing, contacting, or coming within 100 yards of the minor children (Minors) of plaintiff Denise M. (plaintiff). We reverse and remand to the trial court to consider certain evidence it previously excluded when determining the probability of future harassment.

BACKGROUND

Plaintiff was looking for a babysitter for her then six-year-old twin children, Minors, one of whom is autistic. She found defendant through a website that connects caregivers with clients. Defendant was a student enrolled at a nearby college.

Between February and May 2013, defendant babysat Minors for approximately 10 to 12 hours per week. In early May 2013, defendant asked whether he could live in plaintiff's home over the summer in exchange for babysitting services. Plaintiff agreed and defendant moved in mid-May.

Defendant was away over Memorial Day weekend. Over that weekend, Minors told plaintiff that defendant had licked their legs; one of the Minors also told plaintiff defendant had "poked" his penis. After defendant returned, plaintiff told him "he could no longer live with us, and that things were not going to work out." Defendant left the same day and sent plaintiff a text message that evening saying, "I'll be honest, don't contact me anymore. There is a zero percent [c]hance that I will work for you again." Defendant left at least some of his belongings behind, telling plaintiff in a text message: "Your cleaners can have what I left." Plaintiff contends defendant left what appeared to be all of his belongings behind; defendant states he took "the majority" of his things.

Over the Fourth of July weekend, plaintiff asked one of the Minors why he had been "acting up recently." In response, both Minors told plaintiff that defendant had tied their wrists and ankles, placed them in sleeping bags and a soft suitcase, and sat on them; urinated in their mouths; and sexually assaulted them. Minors also told plaintiff that defendant "had warned them not to tell anyone about his actions, and said that if [Minors] did so, [defendant] would harm [plaintiff] and also place [Minors] in suitcases in the basement, sit on them, and never let them up."

Minors have been in psychological counseling since late August or September 2013; their treating therapists submitted declarations stating Minors told them of physical and sexual abuse by defendant. Minors' therapists stated Minors expressed fear that defendant will return to their home and hurt them or plaintiff. Both therapists opined that any further contact with defendant would exacerbate Minors' psychological distress and should be avoided.

Plaintiff also contacted the police, who interviewed Minors. On August 21, 2013, defendant was arrested. He was released after posting bail.[1] In her declaration, plaintiff states she was told by the San Mateo County District Attorney that during a police

[1] In February 2014, the district attorney's office informed plaintiff they were not pressing charges against defendant.

interview defendant had admitted "to tying [Minors'] arms and legs, placing them in a sleeping bag, and then putting them in a suitcase."

On September 6, 2013, plaintiff filed the instant request for a civil harassment restraining order protecting herself and Minors pursuant to Code of Civil Procedure section 527.6.[2] A temporary restraining order issued the same day. The hearing was continued and the temporary restraining order reissued several times at defendant's request, due to his then-pending criminal case.

The parties submitted all their evidence through written declarations. Plaintiff submitted declarations from herself, Minors' therapists, Minors' former nanny (who was also a behavioral therapist for the Minor with autism), Minors' grandmother, and the kindergarten teacher of one of the Minors, as well as videotape recordings of the police interviews with Minors, a partial transcript of one of these interviews, and a police statement provided by plaintiff. Defendant submitted a declaration providing his version of the events and categorically denying any sexual abuse or inappropriate behavior; a declaration from the president of defendant's college stating defendant receives academic and athletic scholarships, has been recognized for academic achievement, and has been "a model citizen and student"; a declaration from his supervisor at a prior job working with youths and adults with disabilities; a declaration corroborating defendant's contention that he took some of his belongings from plaintiff's home when he left; a declaration from a friend who observed defendant interacting with one of the Minors; and declarations from defendant's mother and uncle.

On May 19, 2014, the trial court issued a written order granting a two-year civil harassment injunction protecting Minors. The trial court denied plaintiff's request for an injunction protecting herself. This appeal followed.

DISCUSSION

"Section 527.6 provides injunctive relief to a person who has suffered harassment." (*Russell v. Douvan* (2003) 112 Cal.App.4th 399, 401 (*Russell*).)

[2] All undesignated section references are to the Code of Civil Procedure.

Harassment is defined as "unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose." (§ 527.6, subd. (b)(3).) If, following a hearing, "the judge finds by clear and convincing evidence that unlawful harassment exists, an injunction shall issue prohibiting the harassment." (§ 527.6, subd. (i).) " ' "Clear and convincing" evidence requires a finding of high probability.' " (*Russell*, at p. 401.)

"The appropriate test on appeal is whether the findings (express and implied) that support the trial court's entry of the restraining order are justified by substantial evidence in the record." (*R.D. v. P.M.* (2011) 202 Cal.App.4th 181, 188 (*R.D.*).) " ' "[T]he applicable standards of appellate review of a judgment based on affidavits or declarations are the same as for a judgment following oral testimony: We must accept the trial court's resolution of disputed facts when supported by substantial evidence; we must presume the court found every fact and drew every permissible inference necessary to support its judgment, and defer to its determination of credibility of the witnesses and the weight of the evidence." ' " (*Santa Clara County Correctional Peace Officers' Assn., Inc. v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1027; see *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479.) "[W]hether the facts, when construed most favorably in [respondent's] favor, are legally sufficient to constitute civil harassment under section 527.6, and whether the restraining order passes constitutional muster, are questions of law subject to de novo review." (*R.D.*, at p. 188.)

I. *Past Harassment*

Defendant contends the trial court improperly rejected his evidentiary challenges to certain of plaintiff's evidence. He also challenges the trial court's conclusion that plaintiff's evidence was reliable. We reject these contentions.

A. *Therapists' Declarations*

Defendant challenges the trial court's admission of declarations from Minors' therapists on multiple grounds. We find any error was harmless.

1. *Expert Testimony Regarding Sexual Abuse*

Minors' therapists' declarations included the opinions that one of the Minors' accounts of physical and sexual abuse by defendant was "credible," and that Minors were victims of physical and sexual abuse by defendant.

Defendant contends these opinions are impermissible, citing criminal cases. (E.g., *People v. Bowker* (1988) 203 Cal.App.3d 385, 394; *People v. Bledsoe* (1984) 36 Cal.3d 236, 251.) However, defendant has provided no authority demonstrating these cases should apply here. As plaintiff argues, courts have held that "[l]ess strict rules of admissibility apply where child abuse is an issue in noncriminal cases, such as Welfare and Institutions Code section 300 dependency proceedings." (*People v. Roscoe* (1985) 168 Cal.App.3d 1093, 1100, fn. 4 (*Roscoe*) [finding inadmissible treating psychiatrist's testimony that victim had been molested].) Plaintiff also points to a non-criminal case, *In re Cheryl H.* (1984) 153 Cal.App.3d 1098 (*Cheryl H.*), overruled on another ground in *People v. Brown* (1994) 8 Cal.4th 746, in which the court found admissible a treating psychiatrist's opinion that the child had been sexually abused. (*Id.* at pp. 1116–1118.)

Defendant argues a section 527.6 proceeding is not akin to a dependency proceeding, but we conclude for present purposes it is more analogous to a dependency proceeding than a criminal prosecution. Notably, section 527.6 by its own terms relaxes some of the usual evidentiary rules, providing the court shall "receive any testimony that is relevant" (§ 527.6, subd. (i)), language that has been interpreted to permit the admission of hearsay evidence during such hearings. (*Duronslet v. Kamps* (2012) 203 Cal.App.4th 717, 728–729 (*Duronslet*).) As defendant has failed to demonstrate the rule expressed in the cited criminal cases should apply here, we reject his argument that Minors' therapists' opinion that Minors had been abused was inadmissible.

Cheryl H. did hold the treating psychiatrist's testimony about *who* caused the abuse was inadmissible to support a finding that a particular person was responsible. (*Cheryl H., supra,* 153 Cal.App.3d at p. 1121.) To the extent the trial court relied on the therapists' opinions that defendant was the person who abused Minors, the error is harmless. There was no evidence of any other possible perpetrator and defendant was

identified by Minors themselves. (See *Huffman v. Interstate Brands Companies* (2004) 121 Cal.App.4th 679, 692 (*Huffman*) [erroneous admission of evidence warrants reversal only where "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error"].)

2. *Foundation*

Defendant next argues the trial court's finding that Minors' therapists had sufficient qualifications to testify as experts was error. " 'A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.' . . . A claim that expert opinion evidence improperly has been admitted is reviewed on appeal for abuse of discretion." (*People v. Catlin* (2001) 26 Cal.4th 81, 131.)

One of the therapists, Dr. Kletter, completed doctoral studies at Pacific Graduate School of Psychology, is a licensed psychologist specializing in children and families, is a clinical instructor at Stanford University School of Medicine and Lab Director at the Stanford Medical Early Life Stress Program (where she has worked for the past 11 years), treats patients, and performs research on childhood trauma. Defendant contends Dr. Kletter is not qualified because she has been practicing for less than six years and does not claim experience treating sex abuse victims or training in forensic psychology. In light of Dr. Kletter's experience and training in early life stress and childhood trauma, defendant has not persuaded us the trial court's qualification finding was an abuse of discretion.

The other therapist, Dr. Sanchez, is a licensed physician, graduated from the Keck School of Medicine at the University of Southern California, completed a residency in General Psychiatry at Stanford University School of Medicine, and is currently a Fellow in Child and Adolescent Psychiatry at Stanford University School of Medicine. As the trial court noted in its opinion, Dr. Sanchez works under the direct supervision of Dr. Carrion, a professor of psychiatry and treating physician.

Defendant argues Dr. Sanchez has not completed his training and claims no experience treating sexual abuse victims or with forensic psychiatry. Dr. Sanchez is a

licensed physician who has training in psychiatry and some training and experience with child psychiatry. Even if the trial court's finding that Dr. Sanchez was qualified was an abuse of discretion, the error would be harmless. (*Huffman, supra,* 121 Cal.App.4th at p. 692.) Dr. Sanchez's supervising physician, Dr. Carrion, who has extensive training and experience in child psychiatry, childhood trauma, and child sexual abuse, submitted a declaration agreeing with Dr. Sanchez's opinions.[3]

3. *Reasonable Medical Certainty*

Defendant finally challenges the therapists' declarations on the ground they fail to state their opinions are to a reasonable medical certainty. Defendant cites *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1118, which provides, " 'The law is well settled that in a personal injury action causation must be proven within a reasonable medical probability based [on] competent expert testimony. Mere possibility alone is insufficient to establish a prima facie case.' " However, *Jennings* does not provide the expert's testimony must use the words "reasonable medical probability," instead, it provides the evidence must prove the identified fact within a reasonable medical probability. (See *Garcia v. Duro Dyne Corp.* (2007) 156 Cal.App.4th 92, 97–98 ["It is 'not required' for a doctor to 'testify that he [is] reasonably certain that the plaintiff would be disabled in the future. All that is required to establish future disability is that from all the evidence, including the expert testimony, if there be any, it satisfactorily appears that such disability will occur with reasonable certainty.' "].) *Jennings* does not demonstrate error in the admission of the therapists' declarations.

[3] Defendant contends the trial court excluded Dr. Carrion's declaration as irrelevant, pointing to the trial court's ruling sustaining defendant's relevance objections to evidence not appearing in the trial court's summary of proffered evidence. However, the trial court's summary included the fact that Dr. Sanchez worked under the direct supervision of Dr. Carrion. Dr. Carrion's supervision of Dr. Sanchez is only relevant if Dr. Carrion agrees with Dr. Sanchez. Accordingly, even if the trial court's summary did not specifically note that Dr. Carrion agreed with Dr. Sanchez's opinions, we decline to find the trial court found this evidence irrelevant.

B. *Plaintiff's Declaration Regarding Defendant's Statements to Police*

Defendant contends the trial court erred in admitting the following statement in plaintiff's declaration: "District Attorney Steve Wagstaffe . . . relayed to me that [defendant] had admitted, during his police interview, to tying [Minors'] arms and legs, placing them in a sleeping bag, and then putting them in a suitcase." Defendant argues Wagstaffe's hearsay statement lacks foundation because there is no evidence Wagstaffe had personal knowledge of defendant's admission.

"We review the trial court's determination of the existence of the preliminary fact of personal knowledge under an abuse of discretion standard." (*People v. Tatum* (2003) 108 Cal.App.4th 288, 298.) The trial court could reasonably infer that Wagstaffe either personally witnessed defendant's interview or was informed of the statement by someone who witnessed it. As noted above, hearsay evidence is admissible in section 527.6 hearings. (*Duronslet, supra,* 203 Cal.App.4th at pp. 728–729.) Although the multiple levels of hearsay should factor into the weight afforded the evidence by the trial court, we cannot conclude it was an abuse of discretion to admit the statement.

C. *Indicia of Reliability*

The trial court's written order provided, "While Code of Civil Procedure section 527.6[,] subdivision (i) does not expressly condition 'receipt' of relevant evidence with any determination of reliability, this court finds the evidence recited above [in support of plaintiff] to be reliable." The court then identified five reasons it found plaintiff's evidence reliable.

Defendant raises challenges to each of these five reasons and argues they therefore do not support the trial court's determination that plaintiff's evidence was reliable. Defendant has cited no authority requiring the trial court to make a specific reliability finding before crediting evidence. Defendant's argument, in effect, is that the trial court should not have credited plaintiff's evidence.

" ' " 'To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions.

[Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.' " ' " (*Bloxham v. Saldinger* (2014) 228 Cal.App.4th 729, 750.) Defendant has not shown any of the challenged statements are physically impossible or that their falsity is apparent without resorting to inferences. "As the reviewing court, '[w]e resolve neither credibility issues nor evidentiary conflicts.' " (*Ibid.*) Defendant's challenge to the trial court's finding of reliability fails.

II. *Probability of Future Harassment*

"[A]n injunction restraining future conduct is authorized by section 527.6 only when it appears from the evidence that the harassment is likely to recur in the future." (*R.D., supra,* 202 Cal.App.4th at p. 189.) This requirement derives from the general principle that "an injunction serves to prevent future injury and is not applicable to wrongs that have been completed. An injunction is authorized only when it appears that wrongful acts are likely to recur." (*Russell, supra,* 112 Cal.App.4th at p. 402.) It is also consistent with the statutory language requiring a finding "that 'unlawful harassment *exists*' [citation], not that it existed in the past." (*Id.* at p. 403.) "[T]he determination of whether it is reasonably probable an unlawful act will be repeated in the future rests upon the nature of the unlawful violent act evaluated in the light of the relevant surrounding circumstances of its commission and whether precipitating circumstances continue to exist so as to establish the likelihood of future harm." (*Scripps Health v. Marin* (1999) 72 Cal.App.4th 324, 335, fn. 9 (*Scripps Health*).)[4]

The trial court appeared to base its finding of a threat of future harm on a finding that "even incidental contact between [Minors] and [d]efendant could aggravate the psychological harm that has occurred." However, we agree with defendant's contention

[4] *Scripps Health* involved section 527.8, a statute providing injunctive relief for workplace harassment. Courts have characterized the two statutes as "parallel" and relied on cases interpreting the other statute. (*Scripps Health, supra,* 72 Cal.App.4th at p. 333; *Russell, supra,* 112 Cal.App.4th at p. 402.)

that this finding is not legally sufficient to warrant the injunction. To grant an injunction, the trial court must find the injunction is needed to prevent the recurrence of *harassment*. (*Russell, supra,* 112 Cal.App.4th at p. 403 [trial court must find "that 'unlawful harassment *exists*' [citation], not that it existed in the past"]; *Scripps Health, supra,* 72 Cal.App.4th at p. 331 [the plaintiff must "establish great or irreparable harm would result to an employee without issuance of the prohibitory injunction *because of the reasonable probability the wrongful acts will be repeated in the future*," italics added].) Incidental contact, even when it results in harm, is not harassment. (§ 527.6, subd. (b)(3) [" 'Harassment' is unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose."].) Indeed, the injunctions issued—prohibiting defendant from harassing or contacting Minors and requiring him to stay at least 100 yards from Minors' home, school, and place of childcare—do not preclude incidental contact and therefore do not prevent this potential harm.

Plaintiff argues the trial court's finding of past harassment can support a finding that future harassment is probable. However, the past harassment must be "evaluated in the light of the relevant surrounding circumstances of its commission and whether precipitating circumstances continue to exist so as to establish the likelihood of future harm." (*Scripps Health, supra,* 72 Cal.App.4th at p. 335, fn. 9.) For example, in *Scripps Health,* the defendant's mother was a patient at the plaintiff's hospital, and the defendant disagreed with physicians who wanted to discharge her. (*Scripps Health, supra,* at p. 327.) At a meeting with hospital officials, the defendant struck one of them with a door. (*Id.* at pp. 327-328.) The hospital sought, and obtained, a workplace harassment injunction against the defendant. (*Id.* at pp. 328, 330.) The Court of Appeal reversed, finding no substantial evidence establishing a reasonable probability the defendant's wrongful acts would be repeated in the future. (*Id.* at p. 336.) Significantly, the defendant's mother had subsequently been hospitalized overnight at the plaintiff's hospital without incident, and had thereafter changed her health insurance "rendering it unlikely she would have to return as a patient to a Scripps Health facility." (*Ibid.*)

Similarly, in *Russell* an attorney "forcefully grabbed [the] arm" of another attorney following a court appearance at which they represented opposite sides. (*Russell, supra*, 112 Cal.App.4th at p. 400.) The second attorney sought an injunction under section 527.6. (*Ibid.*) At the time of the hearing on the injunction, the parties were no longer representing adversaries and they informed the trial court they did not " 'regularly' " oppose each other. (*Ibid.*) The trial court issued the injunction and the Court of Appeal reversed because the trial court failed to find any threat of future harm. (*Id.* at p. 401.)

As in *Scripps Health* and *Russell,* the circumstances surrounding the underlying harassment of Minors are no longer present. All of the harassment took place when Minors were alone with defendant and entrusted to his care, a circumstance which will not recur. After the babysitting arrangement ended—including during the more than three months before plaintiff obtained the temporary restraining order—there is no evidence defendant harassed, threatened, or tried to contact Minors in any way. The cases cited by plaintiff are distinguishable because in those cases the precipitating circumstances had not changed. (*City of San Jose v. Garbett* (2010) 190 Cal.App.4th 526, 542 [distinguishing *Scripps Health* because the defendant, "by contrast [to the *Scripps Health* defendant], continued to appear regularly at City Hall [the site of past harassment]"]; *R.D., supra,* 202 Cal.App.4th at p. 190 [affirming harassment injunction where the defendant "not only had a record of past harassment of [the plaintiff], but also a history of angry outbursts and erratic behavior, and a remaining obsessive focus on [the plaintiff's] termination of her professional relationship with [the defendant] two years earlier"].)

Plaintiff also points to evidence that defendant threatened Minors while he was babysitting them, telling them not to tell plaintiff about the abuse and harassment or he would "place [Minors] in suitcases in the basement, sit on them, and never let them up." This threat mirrors certain abusive conduct the Minors claimed Defendant had engaged in while caring for them. Defendant argues the trial court excluded evidence of these threats as irrelevant. The trial court's written order sets forth a summary of the relevant facts and issues a summary ruling on defendant's relevance objections as follows: "To

the extent that Defendant has objected to evidence not appearing in the Summary of Proffered Evidence Section of this order on the grounds that such evidence is irrelevant, such objections are SUSTAINED." Although the factual summary includes evidence that Minors are afraid of defendant, it does not include any evidence that defendant threatened Minors or plaintiff with future harm. It appears, therefore, that the trial court excluded evidence of the threats as irrelevant.[5] In any event, the trial court did not expressly consider the threats when evaluating the probability of future harm.

To the extent the trial court excluded evidence of the threats as irrelevant, it abused its discretion in so ruling.[6] We have concluded the other evidence is not sufficient to find a probability of future harm; however, the threats—if the trial court found them credible and evaluated them in light of all the surrounding facts—could support such a finding. We will remand for the trial court to conduct this analysis. (*Kemp Bros. Construction, Inc. v. Titan Electric Corp.* (2007) 146 Cal.App.4th 1474, 1477–1478 ["[w]here the record demonstrates the trial judge did not weigh the evidence, the presumption of correctness is overcome" and remand to permit weighing of the evidence

[5] There is a basis in the record for concluding the trial court reached a contrary conclusion and determined that the threats were relevant. In a different section of the trial court's order, the court quotes a threat alleged in plaintiff's request for a temporary restraining order and notes this allegation "if supported by competent admissible evidence would justify the three year restraining order requested."

[6] Although defendant claims plaintiff's failure to file a cross-appeal precludes our review of this evidentiary ruling on appeal, we disagree. " 'It is a general rule a respondent who has not appealed from the judgment may not urge error on appeal. [Citation.] A limited exception to this rule is provided by . . . section 906, which states in pertinent part: "The respondent . . . may, without appealing from [the] judgment, request the reviewing court to and it may review any of the foregoing [described orders or rulings] for the purpose of determining whether or not the appellant was prejudiced by the error or errors upon which he relies for reversal or modification of the judgment from which the appeal is taken." "The purpose of the statutory exception is to allow a respondent to assert a legal theory which may result in affirmance of the judgment." ' " (*Adoption of H.R.* (2012) 205 Cal.App.4th 455, 466–467.)

is appropriate].)[7] Because past harassment must be "evaluated in the light of . . . whether precipitating circumstances continue to exist so as to establish the likelihood of future harm" (*Scripps Health, supra,* 72 Cal.App.4th at p. 335, fn. 9), the trial court may consider admitting additional written declarations or oral testimony.

III. *Due Process*

Defendant contends his due process rights were violated because plaintiff's initial request for a restraining order alleged defendant sexually abused Minors, while the trial court granted the injunction on the ground that defendant placed Minors in sleeping bags and suitcases. We need not decide whether defendant's characterization of the basis of the trial court's order is accurate; even assuming it is, we reject defendant's contention.

Defendant's sole authority is *Kobey v. Morton* (1991) 228 Cal.App.3d 1055, in which the trial court issued mutual restraining orders even though only the plaintiff had filed a petition seeking an injunction. (*Id.* at p. 1058.) The Court of Appeal reversed the restraining order protecting the defendant, holding "section 527.6 calls for the formality of a cross-complaint before the court imposes on the plaintiff 'what approximates a permanent injunction.' The court's inherent power does not extend so far as to encompass an order without a petition to serve as a vehicle for that order." (*Id.* at p. 1060.)

Not only did plaintiff file a petition, her petition alleged the precise conduct defendant claims is at the basis of the issued restraining order. Plaintiff's initial request, in addition to alleging sexual abuse, alleged defendant "imprisoned [Minors] violently down basement (closed, blocked door, enclosed them in sleeping bags, suitcases where they couldn't breathe . . .)." Defendant has not demonstrated his due process rights were violated.

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[7] In light of the trial court's reference to the allegations of threats (see *ante,* fn. 5), we are dubious that the trial court in fact considered evidence of the threats irrelevant, despite its summary evidentiary ruling. Nonetheless, out of an abundance of caution, we are remanding to enable the trial court to expressly consider this evidence.

DISPOSITION

The order granting injunctive relief is reversed and remanded for further proceedings consistent with this opinion. The parties shall bear their own costs on appeal.

SIMONS, J.

I concur.

JONES, P.J.

NEEDHAM, J., Concurring and Dissenting.

I concur in the majority's reversal of the order granting injunctive relief under Code of Civil Procedure section 527.6, subdivision (a),[1] because I agree that the evidence considered by the trial court does not support a finding that future harassment is likely to recur. I respectfully dissent from the order remanding the case for additional proceedings so the court can reconsider evidence of threats it purportedly excluded as irrelevant. Even if the threats are presumed to be true and are added to the mix of evidence in this case, the circumstances viewed as a whole do not support a finding of likely future harassment.

An injunction under section 527.6 is authorized "only when it appears from the evidence that the harassment is likely to recur in the future." (*R.D. v. P.M.* (2011) 202 Cal.App.4th 181, 189.) This is because "an injunction serves to prevent future injury and is not applicable to wrongs that have been completed." (*Russell v. Douvan* (2003) 112 Cal.App.4th 399, 402 [reversing injunction issued against a lawyer based on a one-time incident of battery against opposing counsel when the evidence showed the attorneys did not regularly do business together or oppose one another]; see *Scripps Health v. Marin* (1999) 72 Cal.App.4th 324, 336 [reversing workplace safety injunction under § 527.8 against son of a patient who had struck a hospital administrator with a door; patient was no longer receiving care at the hospital and evidence did not support a finding the son was likely to repeat violent acts against hospital employees].)

The only mention of future harassment in the trial court's written order is the following statement: "While Defense counsel asserts that there is little chance that the unlawful alleged acts—forced sex and binding the minors and placing them in suitcases—[*sic*] this court notes that the primary harm caused by such acts is psychological harm, and that even incidental contact between the minors and Defendant could aggravate the psychological harm that has occurred." My colleagues correctly

[1] Further statutory references are to the Code of Civil Procedure.

observe that such incidental contact would not amount to a recurrence of *harassment*, which is statutorily defined as "unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose." (§ 527.6, subd. (b)(3).) They also reject—again correctly—plaintiff's claim that past acts of harassment support a finding of future harassment: "All of the harassment took place when Minors were alone with defendant and entrusted to his care, a circumstance which will not recur. After the babysitting arrangement ended—including during the more than three months before plaintiff obtained the temporary restraining order—there is no evidence defendant harassed, threatened, or tried to contact Minors in any way." (Maj. opn., *ante*, at pp. 11.)

While I agree wholeheartedly with the foregoing analysis, and with the ineluctable conclusion that the evidence considered by the court did not support the restraining order issued, I do not agree the case should be remanded for further proceedings to allow the trial court to assess the likelihood of future harassment in light of evidence of threats made by the defendant that it may have improperly excluded. In my view, there is no need for such a proceeding because the evidence, even if admitted, is insufficient to show that future harassment is likely to occur.

The issue arises in the following context: In addition to the acts of sexual and psychological abuse alleged in the petition and described in the supporting declarations, plaintiff submitted a supplemental declaration stating that Minors told her they had not come forward right away because defendant had threatened them with further acts of abuse and harm to their mother if they told her what had happened. The trial court's written order did not refer to these threats in its "Summary of Proffered Evidence," and included a footnote stating: "For sake of brevity, this summary excludes evidence that the court found irrelevant to the issuance of the restraining order at issue. For example, Ms. [M.]'s education and employment achievements are omitted. The fact that [defendant] was charged with specific criminal acts that were later dismissed is irrelevant to this action." Later in the order, the court explicitly ruled on defendant's relevancy

objections: "To [the] extent that Defendant has objected to evidence not appearing in the Summary of Proffered Evidence Section of this order on the grounds that such evidence is irrelevant, such objections are SUSTAINED." Defendant had objected to the evidence of threats as (among other things) irrelevant.

I agree it would be an abuse of discretion to exclude the evidence of threats made by defendant to Minors on relevancy grounds. Plainly, a threat to commit future acts amounting to harassment under section 527.6 would be *relevant* to determining whether future harassment is likely to occur, even if the court ultimately does not find the evidence of such threats to be credible and does not accord them any weight. In light of the blanket nature of the trial court's ruling on the relevancy objection, and because the alleged threats are so obviously relevant to the likelihood of future harassment, I am skeptical the court intentionally excluded the evidence of threats as inadmissible on that ground. But assuming the language in the written order indicating such a ruling was intentional rather than an oversight, the evidence of threats would not change the result in this case.

The underlying conduct described by Minors was egregious and amounted to harassment under section 527.6, but those acts were finished by the time this proceeding for injunctive relief was filed. A number of circumstances rendered the harassment unlikely to recur: the change in the relationship between plaintiff and defendant; defendant's move from plaintiff's home with no apparent intent to return; defendant's lack of contact with Minors after he left the home; the criminal investigation of Minors' allegations; and the passage of time with no further effort by defendant to contact plaintiff or Minors. The threats described by plaintiff mirrored the original acts of harassment and were made at the same time as those acts, with the apparent intent of dissuading Minors from coming forward. But there was no effort by defendant to carry out the threats once Minors did come forward, and the same changed circumstances that rendered it unlikely the underlying harassment would recur made it equally unlikely defendant would act on the threats.

Assuming defendant made the threats as alleged by plaintiff, the evidence was insufficient to support a reasonable inference defendant was likely to harass Minors in the future. For this reason, I would simply reverse the order granting the injunction rather than remanding the case for further proceedings and allowing additional evidence. If circumstances change, and new facts suggest defendant is likely to commit further acts of harassment against Minors, nothing prevents plaintiff from filing a new petition seeking injunctive relief on that basis.

NEEDHAM, J.